IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPLICATION NO.536 OF 2007
IN
CRIMINAL APPEAL NO.175 OF 2007

Santosh Kumar Ramshankar Yadav
Undergoing sentence at
Pune Central Prison ...Applicant.
V/s.

The State of Maharashtra ...Respondent.

Mr.M.M.Najmi, adv. appointed for the Applicant.
Shri Y.S.Shinde, APP for the Respondent/State.

CORAM: J.H.BHATIA, J.
DATE : 30TH April, 2007.

P.C.:

1. Heard Mr.Najmi advocated appointed for the applicant and Mr.Shinde the learned APP for the State.

2. The applicant is convicted by the Additional Sessions Judge, Greater Bombay for the offences punishable under Sections 363 and 376 of the I.P.C. and was sentenced to undergo R.I. for 7 years and for 10 years respectively. He was also sentenced to pay fine of Rs.10,000/- on each count and in default to undergo further R.I. for 2 years on each count. The applicant has preferred the appeal limited to the point of sentence. However, there is a delay of 4 years and 300 days in filing the appeal. According to the applicant

because of the poverty, ignorance of procedure and being continuously in jail even prior to the conviction, he could not prefer an appeal. Taking into consideration the sentence awarded, long period during which the present applicant was in jail and the limited prayer, I find that in the interest of justice, delay may be condoned. Delay is hereby condoned.

3. Application is allowed.

(J.H.Bhatia,J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

SIDE JURISDICTION

CRIMINAL APPEAL NO.175 OF 2007

Santosh Kumar Ramshankar Yadav
Undergoing sentence at
Pune Central Prison ...Appellant.

V/s.

The State of Maharashtra ...Respondent.

Mr.M.M.Najmi, adv. appointed for the Appellant.
Shri Y.S.Shinde, APP for the Respondent/State.

CORAM: J.H.BHATIA, J.

DATE : 30TH April, 2007.

ORAL JUDGMENT:

1. Heard Mr.Najmi advocated appointed for the appellant, who has filed this appeal through jail and Mr.Shinde the learned APP for the State.

2. Admit.

3. Taking into consideration the limited prayer in appeal, with consent of the learned counsel for both the parties, appeal is taken up for final hearing immediately.

4. Prosecution case in brief is that, the present appellant was known to the prosecutrix, a girl aged about 4 1/2 years, her mother P.W.1 Nirmala Yadav, her father and other relatives because they were residing in the same locality. According to the prosecution on 17th April, 1999 at about 9.00 p.m., the victim girl and her sister were playing near their house. At that time, the accused took the benefit of his acquaintance with them and picked up the prosecutrix and took her towards the Shukla compound and after going there, he removed her clothes and committed rape on her. As the girl did not return home till 11.30 p.m., search was made and two witnesses namely, P.W.4 Vinodkumar Yadav and P.W.5 Vijay informed that they had seen the accused with the girl and P.W.5 Vijay also informed that he had seen the accused coming out from the Shukla compound leaving the girl there in unconscious condition. Thereafter, her relatives went to that place and picked up her and took

her to hospital and on regaining consciousness she informed about the said incident. Medical Officer, who examined the prosecutrix found some injuries on her lips, cheeks and also on the private part. On the same day report was lodged at the police station by mother of the prosecutrix and after investigation, charge-sheet was filed.

5. Initially charge was framed against the accused for the offences punishable under Sections 376 and 506 of the I.P.C. However, it was altered to Section 376(2)(f) and 363 of the I.P.C. The accused pleaded not guilty. On behalf of the prosecution, in all 12 witnesses were examined and several documents were placed on record. After hearing the prosecution evidence, the learned Additional Sessions Judge convicted the accused for the offences punishable under Section 376(2)(f) and sentenced him to undergo R.I. for 10 years and to pay a fine of Rs.10,000/- and in default to pay fine to undergo further R.I. for two years. The appellant was also convicted for the offences punishable under Section 363 of the I.P.C. and sentenced to undergo R.I. for 7 years and to pay a fine of Rs.10,000/- and in default to undergo further R.I. for two years. The appellant was in jail from 17th April, 1999 when the incident had occurred and was convicted on

29-11-2001. Recently he has filed this appeal challenging the conviction and sentence. However, his main prayer is for reduction of fine and the imprisonment in default to pay fine. According to him, because of poverty, he is not able to pay huge fine amount of Rs.20,000/- and due to this he may be required to remain in jail for a period of 4 years more.

6. Heard the learned counsel for both the parties and perused the record. In view of the oral evidence of the prosecutrix, her mother and other witnesses as also the medical officer, who examined her, it appears that she was aged about 4 and half years at the time of the incident. There is no reason to disbelieve the prosecution evidence that the accused had committed the offence of rape on her. It was pointed out on behalf of the defence that hymen of the prosecutrix was found intact during the medical examination. However, the learned Additional Sessions Judge noted that as per the evidence of P.W.8 Dr. Rajendra Sarogi, who had examined the prosecutrix with the help of a lady Doctor, he had found that there were injuries on her left cheek and on the lower lip on inner side. There was also a small laceration superficial on the fourchette with minimum bleeding at that side. Doctor explained that in the case of a girl of such a tender age, hymen is situated

deep inside and is covered by labia minora and vulva and, therefore, unless there is a great force and pressure used by the offender, hymen may not get torn. Therefore, merely because hymen was intact, it can not be said that rape was not committed. Taking into consideration medical evidence, I find that the evidence of the prosecutrix could be safely relied upon.

7. In view of the gruesome crime of rape on a small girl aged about four and half years, I find no fault with the substantive sentence of imprisonment for 10 years, which is the minimum prescribed sentence under Section 376(2)(f) of the I.P.C. The offence under Section 363 carries maximum sentence of imprisonment of 7 years with some fine . The learned trial Court awarded R.I. for 7 years, which is maximum sentence. As this sentence of imprisonment runs concurrently with the sentence of R.I. awarded for the offence of rape, it does not make much difference to the accused. However, the trial Court also awarded sentence of fine of Rs.10,000/- on each count and in default to pay fine, R.I. for two years on each count, which means that in the case of his failure to pay fine, the accused will be required to undergo further R.I. for four years. If the accused would be financially well-to-do , it would not be difficult for him to pay fine. However, it

appears that accused is the poor person. It appears that because of the poverty, he could not engage any lawyer and could not prefer any appeal at the earliest. He has preferred this appeal through the jail and this Court has appointed advocate for the appellant from the legal aid panel, because he is poor. In my opinion while the sentence of R.I. on both the counts is justified, imprisonment for four years merely because he is not able to pay fine, would amount to punishing him for his poverty. If he could pay the fine, there could be no harm in imposing heavy fine, so that some compensation could be paid to the victim girl. Incidentally in this case, the learned trial Court did not pass any order to pay compensation out of the fine amount to the victim. In these circumstances, in my opinion the fine and the sentence in default to pay fine are very harsh and need to be modified.

8. Taking into consideration all the facts and circumstances, appeal is partly allowed. Conviction of the accused under Section 376(2)(f) and 363 of the I.P.C. is maintained. However, the sentence stands modified as follows:

(a). For the offences punishable under Sections 376(2)(f) of the I.P.C, the accused is sentenced to

undergo R.I. for ten years and to pay fine of Rs.1,000/- and in default to undergo further R.I. for two months.

(b). For the offences punishable under Section 363 of the I.P.C., accused is sentenced to undergo R.I. for 7 years and to pay fine of Rs.500/- and in default to pay fine to undergo further R.I. for one month. Substantive sentence of imprisonment on both the counts shall run concurrently. As the accused was in jail from 17th April, 1999 till 29-11-2001, the said period shall be set off against the substantive sentence of imprisonment.

(J.H.Bhatia,J.)